QUESTIONS PRESENTED

I.

DO PRISON PHYSICIANS - WHETHER PERMANENT MEMBERS OF A STATE PRISON MEDICAL STAFF, OR UNDER CONTRACT WITH THE STATE PRISON SYSTEM - ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 LIABILITY IN THEIR TREATMENT OF STATE PRISON INMATES?

II.

DID A PHYSICIAN WHO WAS UNDER CONTRACT TO PROVIDE ORTHOPEDIC SERVICES TO INMATES AT A STATE PRISON HOSPITAL ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF § 1983 IN HIS TREATMENT OF A NORTH CAROLINA STATE PRISON INMATE?

PARTIES

The parties to the proceedings below were the petitioner Quincy West, an inmate in the custody of the North Carolina Department of Correction, and defendants Samuel Atkins, Rae McNamara and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction to provide orthopedic services at North Carolina Central Prison Hospital at Raleigh, North Carolina; Rae McNamara was the former Director of the Division of Prisons of the North Carolina Department of Correction, and James B. Hunt was the former Governor of the State of North Carolina.

The District Court dismissed the claims against defendants McNamara and Hunt as frivolous and the Fourth Circuit Court of Appeals dismissed the plaintiff's interlocutory appeal of that Order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of Defendant Hunt, but vacated the dismissal of Defendants Atkins and McNamara.

In its ***en banc*** decision, the Fourth Circuit reaffirmed the District Court's dismissals of Defendants Atkins, McNamara and Hunt. Petitioner West does not challenge the dismissals of Defendants McNamara and Hunt, and thus Defendant Samuel Atkins, a physician formerly under contract to provide orthopedic services at North Carolina Central Prison Hospital, is the only respondent in the Petition for Certiorari.

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NO. 87-5096

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

QUINCY WEST,
Petitioner,

v.

SAMUEL ATKINS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

In an ***en banc*** opinion filed April 9, 1987 reported at 815 F.2d 993 (4th Cir. 1987), the Fourth Circuit Court of Appeals dismissed the Petitioner's Complaint filed pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, against Samuel Atkins, a physician formerly under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital; Rae McNamara, former Director of the Division of Prisons of the North Carolina Department of Correction; and James B. Hunt, former Governor of the State of North Carolina. A copy of the ***en banc*** decision reprinted in the Joint Appendix 43-57 (hereinafter cited as "J.A.").

The September 3, 1986 panel opinion of the Fourth Circuit Court of Appeals is reported at 799 F.2d 923 (4th Cir. 1986).

The panel affirmed the dismissal of Defendant Hunt, but vacated the dismissals of Defendants Atkins and McNamara. On November 12, 1986, the Fourth Circuit Court of Appeals ordered that the decision of the panel be vacated and set the case for oral argument before the ***en banc*** court. J.A. 42.

The June 7, 1985 Order of the United States District Court for the Eastern District of North Carolina dismissing the claims against Defendants Atkins, McNamara and Hunt is not reported and is reprinted in the Joint Appendix 37-38.

From the ***en banc*** opinion of the Fourth Circuit Court of Appeals, West has filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed on July 8, 1987, and granted on October 19, 1987.

STATUTE INVOLVED

The case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, or regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE AND FACTS

Inmate West tore the Achilles tendon in his left leg above his heel string while playing volleyball on July 30, 1983, at the Odom Correctional Center at Jackson, North Carolina. He was examined by Dr. John H. Stanley, who was under contract to provide medical care to inmates at the Odom Correctional Center, and who directed that West be transferred for orthopedic consultation to Central Prison Hospital at Raleigh, North Carolina.[1]

After his transfer on August 9, 1983, Dr. Samuel Atkins, a private physician on contract to provide two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh, North Carolina, [J.A. 22-29][2] examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a long-

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1 West has attached as an appendix to his brief the Health Care Policy established by Section 5 N.C.A.C. 2E.0200 of the North Carolina Division of Prisons Policy and Procedures Manual. Section 208.2. [Petitioner's Appendix 14] of the North Carolina Division of Prisons Policy and Procedures Manual entitled "Local Resources" provides, ***inter alia***, as follows:

> ...If the patient is male, 18 years old or older, a determination will be made by the referring physician as to whether the condition is of such an emergency nature that the services of a local specialist are required. If such is the case, treatment will be obtained in the local community. If the condition of the patient is such that he can be transported to Central Prison Hospital for this care, arrangements will be made for him to be seen at the appropriate speciality clinic at Central Prison Hospital.

2 Section 208.3 [Petitioner's Appendix 14], promulgated pursuant to 5 N.C.A.C.2E.200 is entitled "Central Prison Hospital Specialty Clinics" and provides that inmates scheduled for treatment in the following specialty clinics should be transferred on the days indicated:

leg cast and gave orders that West should return on August 30, 1983. When West returned on August 30, 1983, the cast had been broken above the ankle and the top half was missing. The remaining cast was removed and a new long-leg cast applied. Orders were again given for West's return to Central Prison Hospital in three weeks. The cast was removed on September 20, 1983, and orders were given for West to return in two week. He was seen again by Dr. Atkins on October 4, 1983, and again on October 18, 1983. West next returned to the Orthopedic Clinic at Central Prison Hospital on January 12, 1984, and was discharged by Dr. Atkins on February 14, 1984. West injured his right leg while playing basketball on April 30, 1984. On November 29, 1984, West filed a Pro Se complaint pursuant to 42 U.S.C. § 1983 against Dr. Atkins; James B. Hunt, Governor of the State of North Carolina; and Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Correction. In the complaint West alleged that Dr. Atkins

> ... through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for badly torn Achilles tendon ...[J.A. 4]

As a result, West sought $1,000,000.00 in compensatory and $500,000.00 in punitive damages from Dr. Atkins; $640,000.00 in compensatory and $360,000.00 in punitive damages from Director McNamara; and a declaratory judgment against Governor Hunt. The District Court made a determination of frivolity under 28 U.S.C. § 1915(d) and dismissed the claims against Hunt and McNamara, and the Fourth Circuit

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(Fn. 2 continued from page 3.)

1. Medical - Tuesday or Thursday
2. Surgical - Tuesday or Thursday
3. Mental Health - Tuesday or Thursday
4. Dental - Tuesday or Thursday
5. Eye - Tuesday
6. Neurology - Tuesday
7. Ear, Nose and Throat - Thursday
8. Orthopedics - Tuesday or Thursday
9. Urology - Tuesday or Thursday
10. Endodontics - Tuesday
11. Dermatology - Tuesday
12. Oral Surgery - Tuesday or Thursday

Court of Appeals dismissed West's interlocutory appeal from that Order on April 3, 1985. ***WEST v. ATKINS***, 760 F.2d 266 (4th Cir., April 3, 1985) (No. 85 6092) [Unpublished]. [J.A. 12]

On June 7, 1985, citing ***CALVERT v. SHARP***, 748 F.2d 861 (4th Cir. 1984), ***cert. denied,*** 471 U.S. 1132 (1985), for the proposition that Dr. Atkins was not acting under color of state law for the purposes of § 1983, the District Court allowed Dr. Atkins' Motion for Summary Judgment and dismissed West's complaint. [J.A. 37-38]. Petitioner filed Notice of Appeal to the Fourth Circuit on June 17, 1985; and on September 3, 1986, a panel of the Court held that a determination of whether Dr. Atkins was deliberately indifferent to West's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for the purposes of § 1983. The grant of Summary Judgment to Dr. Atkins and Director McNamara's dismissal under the determination of frivolity under 28 U.S.C. § 1915(d) was vacated and the case remanded to the District Court. [J.A. 39-41].

On November 12, 1986, the Court ordered that the decision of the panel be vacated and the case set for oral argument before the ***en banc*** court. [J.A. 42]. On April 9, 1987 the ***en banc*** court perceived no valid reason to overrule or distinguish ***CALVERT v. SHARP, supra,*** and in reliance on ***POLK COUNTY v. DODSON,*** 454 U.S. 312 (1981), dismissed West's claims holding that Dr. Atkins was not acting under color of state law for purposes of § 1983. [J.A. 43-57]. From this decision, Petitioner West sought a Writ of Certiorari from this Court. The Petition was granted on October 19, 1987. [J.A. 58]

SUMMARY OF ARGUMENT

In this case, the Fourth Circuit Court of Appeals ***en banc*** properly affirmed the District Court's dismissal of Inmate West's § 1983 action against Dr. Samuel Atkins, a private physician under contract to provide two orthopedic clinics a week at North Carolina Central Prison Hospital. The Court relied on its holding in ***CALVERT v. SHARP***, 748 F. 2d 861 (4th Cir. 1984), ***cert. denied***, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985) in which it had previously stated that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." The ***en banc*** opinion in ***WEST v. ATKINS*** and and the opinion in ***CALVERT v. SHARP, supra***, are both correctly decided based upon this Court's opinion in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), which held that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in ***DODSON***, the professional is a full-time employee of the state. In this case Dr. Atkins was not acting under color of state law when treating Inmate West in the orthopedic clinic at Central Prison Hospital and West's § 1983 action against Dr. Atkins was properly dismissed.

Even if the district court had jurisdiction over Dr. Atkins, which it did not, West failed to state an Eighth Amendment claim under ***ESTELLE v. GAMBLE***, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) - especially in light of ***WHITLEY v. ALBERS***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

West's complaint, at best, sets forth a negligence based claim against Dr. Atkins and negligence is not actionable under § 1983. ***DAVIDSON v. CANNON***, 474 U.S. 898, 106 S.Ct.

668, 88 L.Ed.2d 677 (1986); ***DANIELS v. WILLIAMS***, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

ARGUMENT

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DID NOT ERR WHEN IT DISMISSED WEST'S COMPLAINT FILED PURSUANT TO 42 U.S.C. § 1983 UPON A FINDING THAT IT LACKED JURISDICTION OVER THE SUBJECT MATTER BECAUSE DR. ATKINS DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE TREATED WEST.

I.

LACK OF FEDERAL COURT JURISDICTION

Inmate West tore the Achilles tendon in his left leg while playing volleyball on July 30, 1983. West was transferred to Central Prison Hospital and Dr. Atkins, an orthopedic surgeon who maintains a private practice at Raleigh, North Carolina, and was under contract to conduct two orthopedic clinics per week at North Carolina Central Prison Hospital at Raleigh [J.A. 22-29], examined West for the first time on August 9, 1983, and concluded that surgery could be avoided if the tendon would grow back by itself. Dr. Atkins therefore placed West's leg in a long leg cast. In the complaint filed November 29, 1984 West alleged that Dr. Atkins ...

> through his negligence and deliberate indifference to plaintiff's medical needs has denied

> through his negligence and deliberate indifference to plaintiff's medical needs has denied
>
> plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon. ...[J.A. 4]

The issue presented to this Court is identical to that presented to the Fourth Circuit Court of Appeals in ***CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984), cert. denied***, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). In ***CALVERT*** the Fourth Circuit Court of Appeals reasoned as follows:

> To maintain a § 1983 action a plaintiff must establish as a jurisdictional requisite that the defendant acted under color of state law. ***POLK COUNTY***, 454 U.S. at 315. A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Id.* at 317-18 (quoting ***UNITED STATES v. CLASSIC***, 313 U.S. 299, 326 (1941)). The ultimate issue in determining if a person is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to the state. ***RENDELL-BAKER v. KOHN***, 457 U.S. 830, 838 (1982). ...
>
> ***
>
> Unlike the attorney in ***POLK COUNTY***, Dr. Sharp is privately employed. Private physicians exercise their own judgment and make their own medical decisions according to standards not established by the state. ***BLUM v. YARETSKY***, 457 U.S. 991, 1008-09 (1982). Their physician-patient relationships are the same, with the same

> vant of an administrative superior. *See* The American Medical Association Standards for Health Services in Prisons (Standard 102 states: "Matters of medical ... judgment are the *sole* province of the responsible physician.") (Emphasis in original). The American Medical Association Principles on Medical Ethics; The Hippocratic Oaths. The ethical obligations of physicians date back to the time of the ancient Greeks. ***E.g*** , the Hippocratic Oath.

In his brief Calvert recognizes that a physician owes his ethical obligation and undivided loyalty to his patient. The loyalty owed by Dr. Sharp was potentially adverse to the interests of the state. Dr. Sharp had no supervisor or custodial functions. ***Compare POLK COUNTY*** with ***ESTELLE v. GAMBLE***, 429 U.S. 97 (1976), and ***O'CONNOR v. DONALDSON***, 422 U.S. 563 (1975) (in ***ESTELLE v. GAMBLE*** the physicians were employed directly by the state and had custodial or supervisory functions.) Sharp's function and obligation was solely to cure orthopedic problems.

In exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical service to an inmate. ***See HALL v. QUILLEN***, 631 F.2d 1154 (4th Cir. 1980); ***see also BLUM***, 457 U.S. at 1008-09; *cf.* ***POLK COUNTY*** 454 U.S. at 319-24 (in which the Supreme Court discusses the obligations and functions of attorneys).

****

Calvert and the trial court rely on ***ESTELLE v. GAMBLE*** to support the position that Dr. Sharp acted under color of state law by denying him medical attention. This reliance is misplaced. ***ESTELLE*** establishes that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. Nevertheless, a plaintiff must still establish that the defendant acted under color of state law. ***POLK COUNTY***, 454 U.S. at 315. ***ESTELLE*** does not mandate, as ***CALVERT*** claims and the trial judge held, that a person who violates an inmate's Eighth Amendment rights is automatically acting under color of state law. Whether the physician acted under color of state law was not an issue in ***ESTELLE***.

Furthermore, in ***POLK COUNTY***, the Supreme Court distinguished ***ESTELLE*** and ***O'CONNOR v. DONALDSON***, 422 U.S. 563 (1975) as follows:

> ***O'CONNOR*** involves claims against a psychiatrist who served as the superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients.

> On the contrary, it is his function to protect the interest of the public as well as that of his wards. Summarily, ***ESTELLE*** involved a physician who was the medical director of the Texas Department of Corrections and also the Chief Medical Officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity. Because of their custodial and supervisory functions the state employed doctors in ***O'CONNOR*** and ***ESTELLE*** faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the state, through the institution, attempts to achieve.

POLK COUNTY, 454 U.S. at 320.

> Dr. Sharp is a privately employed specialist who treats private patients as well as inmates. He did not have any custodial or supervisory duties. His obligation was not to the mission of the state but to treat patients referred to him by other physicians. He did not act under color of state law.

The result in the case at bar was dictated by the Fourth Circuit's holding in ***CALVERT v. SHARP, supra.*** In that case a Maryland inmate brought a § 1983 action against the doctor for violation of his Eighth Amendment rights. The defendant

doctor was a private orthopedic surgeon employed by Chesapeake Physicians, P.A. (CPPA), a non-profit corporation, employing numerous physicians and health personnel. CPPA provided medical services to the general public and also medical services to inmates through a contract with the State of Maryland. Calvert was referred to Dr. Sharp on five separate occasions from July 1980 to December 1981. Calvert alleged that Dr. Sharp did not treat him on these visits.

In ***CALVERT***, the Fourth Circuit outlined four factors for a Court to apply when faced with the issue of whether a medical professional acted "under color of state law" when rendering medical services to a state prisoner. The Court should ask:

1. Was there a "sufficiently close nexus" between the state and the medical professional's performance of his or her duties for the prison system, so that his or her conduct in these duties must be treated as that of the state itself?

2. In providing the medical services, was the medical professional exercising a function "traditionally the exclusive prerogative of the state"?

3. In providing the medical services, was the medical professional exercising his or her independent medical judgment without

regard to state interests or deference to state authorities?

4. Was the medical professional performing any custodial or supervisory duties for the state prison system?

These factors must be balanced when determining whether the medical professional's actions were fairly attributable to the state. ***CALVERT*** at 862. The standard adopted by the Fourth Circuit in ***CALVERT*** correctly determines whether a physician's actions were under color of state law. The ***CALVERT*** decision is consistent with this Court's holding in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) and is a correct application of the principles enunciated in that case to the facts of the action ***sub judice***.

In holding that the defendant doctor did not act under color of Maryland law, the Fourth Circuit said "the professional obligation and functions of a private physician establish that such physician does not act under color of state law when providing medical services to an inmate." ***CALVERT*** at 863. On the contrary, privately employed physicians exercise their individual judgment and make their own decisions according to standards not established by the state. In fact the physician's loyalty is to his patients and is often adverse to the state. ***Id.*** The Fourth Circuit also noted that the defendant was not "dependent upon state funds" or performing a "public function," two factors considered to determine if a private act is done under color of state law.

The situation presented in this case is very similar to one presented in ***CALVERT***. Specifically, Dr. Atkins is a private physician who contracted with the North Carolina Department of Correction to provide two orthopedic clinics per week to in-

mates at North Carolina Central Prison Hospital. Pursuant to the contract, Dr. Atkins received a weekly payment for his services but did not receive employee benefits. The doctor performed only medical duties and functions and did not have any supervisory or custodial functions at Central Prison Hospital. That the contract is a direct contract between Dr. Atkins and the state, unlike the situation in ***CALVERT*** where there was an intervening general contractor, does not dictate a different result. "Acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." ***RENDELL-BAKER v. KOHN,*** 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418, 427 (1982). In ***RENDELL-BAKER*** this Court stated that:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in ***POLK COUNTY v. DODSON***, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981). There we concluded that, although the state paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." ***Id.*** at 318. Here the relationship between the school and its teachers and counselors is not changed because the state pays the tuition of the students.

The relationship between doctor and patient does not change because the state pays for the doctor.[3] Dr. Atkins exercised independent medical judgment without regard to state authorities. Clearly, the balance weighs against finding that Dr. Atkins acted "under color of state law." A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" ***POLK COUNTY v. DODSON,*** 454 U.S. 312, 317, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), ***quoting UNITED STATES v. CLASSIC***, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). The defendant physician Dr. Atkins, like the defendant physician in ***CALVERT***, was not acting under color of state law. As the Fourth Circuit concluded in ***WEST v. ATKINS, supra:***

> ... [a] professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in ***DODSON***, the professional is a full-time employee of the state. Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is provided.

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3 Providing medical services to inmates is not an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and behalf of the public. ***BLUM v. YARETSKY***, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In ***BLUM*** this Court held that state action was not established in a nursing home's decision to discharge or transfer Medicaid patients to lower levels of care, a decision turning on a medical judgment made by a private party according to professional standards not established by the state and the nursing home not performing a function that has traditionally been the exclusive prerogative of the state. In

In ***CALVERT*** an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under color of state law. The defendant in ***CALVERT*** had no supervisory or custodial functions.

We find the reasoning suggested by the appellant [West] to differentiate the rule in ***DODSON*** from that enunciated in ***CALVERT*** unpersuasive. Although the opinion in ***DODSON*** does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full time employee who is a professional can act without color of state law when his role in essence is adversarial to the interests of the state. Thus, 'a public defender is not amenable to administrative direction in the same sense as other employees of the state.' ***DODSON*** at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

> [West] is probably correct in his argument that the rule enunciated in ***DODSON***, and followed in ***CALVERT***, has the effect of limiting the range of professionals subject to an ***ESTELLE*** action. This effect, however, is entirely consonant with the requirements of § 1983, which statute subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for this court to tamper with the limitation of § 1983 liability established in ***DODSON***.

II.

WEST'S EIGHTH AMENDMENT CLAIM

In order for an inmate to bring a claim of inadequate medical care under 42 U.S.C. § 1983 the mistreatment or nontreatment must be capable of characterization as cruel and unusual punishment. Before a federal court will interfere with the internal operations of a state penal facility a prisoner's allegations must reach constitutional dimensions. ***RUSSELL v. SHEFFER,*** 528 F.2d 318 (4th Cir. 1975). However, "where a prisoner has received some medical attention and a dispute is over the adequacy of the treatment, federal courts are generally reluctant to second-guess medical judgments and to constitutionalize claims which sound in state tort law." ***WESTLAKE v. LUCAS,*** 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

In order to recover for a denial of medical treatment, the plaintiff must show deliberate indifference to serious medical needs. The test is whether such deliberate indifference would offend "evolving standards of decency" in violation of the Eighth Amendment. The complaint that a medical professional has been negligent in diagnosing the medical condition does not state a valid claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely

be[3]s a prisoner." ***ESTELLE v. GAMBLE***, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As this Court recently stated in ***WHITLEY v. ALBERS***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986):

> ... To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in ***ESTELLE v. GAMBLE***, ***supra***, 105-106, which held that a prison physician's 'negligen[ce] in diagnosing or treating a medical condition' did not suffice to make out a claim of cruel and unusual punishment. It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, ***supplying medical needs***, or restoring official control over tumultuous cellblock. ....(Emphasis added.)

In short, West's allegations against Dr. Atkins amount to no more than a claim of medical malpractice - which is not actionable under § 1983. The allegations do not show actions which could rise to the level of a violation of the Eighth Amendment.

III.

WEST'S NEGLIGENCE CLAIM

In any event, even if the district court had jurisdiction over Dr. Atkins, which it did not, under ***BAKER v.***

McCOLLAM, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), ***ESTELLE v. GAMBLE, supra, and WESTER v. JONES***, 554 F.2d 1285 (4th Cir. 1977), West's complaint fails to state a cognizable claim for relief under § 1983. As the Fourth Circuit stated in ***WESTER***:

> ...It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions. Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs. Consequently, Wester's own version of the facts do not support his claim for violation of the Eighth Amendment. We therefore conclude that the district court properly granted summary judgment in favor of the prison authorities.

West's allegations arising out of his claim that Dr. Atkins

> ... Through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn Achilles tendon ...

sets forth, at best, a negligence based claim. Negligence of prison officials is not actionable under § 1983. ***See DAVIDSON v. CANNON***, 474 U.S. 898, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); ***DANIELS v. WILLIAMS***, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In these cases, this Court held that a due process deprivation does not arise from a "negligent act of an official causing unintended lost or injury to life, liberty of

property." Furthermore, West's allegations do not amount to deliberate indifference to his medical needs. ***ESTELLE v. GAMBLE***, ***supra***. In any event, differences concerning a course of treatment do not amount to a constitutional violation. ***BOWRING v. GOODWIN***, 551 F.2d 44, 48 (4th Cir. 1977).

CONCLUSION

In ***BAKER v. McCOLLAM, supra,*** this Court held that § 1983 does not impose liability for violations of duties of care arising out of tort law and the remedy for that type of injury must be sought in state court under traditional tort law principles. This Court noted, citing ***ESTELLE v. GAMBLE, supra,*** that just as medical malpractice does not become a violation of the federal constitution's prohibition of cruel and unusual punishment merely because the victim is a prisoner, false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. This Court's reasoning in ***BAKER v. McCOLLAM, supra***, was expanded in ***PARRATT v. TAYLOR,*** 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which this Court stated that:

> ...to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting "under color of state law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who was invclved in nothing more than án automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning would "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." ***PAUL v. DAVIS***, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

For the foregoing reasons, Respondent respectfully prays that the ***en banc*** opinion of the Fourth Circuit Court of Appeals filed April 9, 1987 be affirmed.

Respectfully submitted,

LACY H. THORNBURG
ATTORNEY GENERAL

Jacob L. Safron
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7188

ATTORNEYS FOR RESPONDENT
ATKINS

CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) copies of the foregoing BRIEF FOR THE RESPONDENT on the attorney of record by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

Richard Giroux, Esq.
North Carolina Prisoners Legal Services, Inc.
112 South Blount Street,
Raleigh, N.C. 27602

This the 12th day of January, 1988.

LACY H. THORNBURG
Attorney General

Jacob L. Safron
Special Deputy Attorney General
P.O. Box 629
Raleigh, N.C. 27602-0629